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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 715.

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,

Petitioners,

—against—

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,

Respondents.

BRIEF OF CONTINENTAL GRAIN COMPANY, RESPONDENT IMPLEADED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This case presents no reason within Rule 38 paragraph 5 for the issuance of a writ of certiorari. Neither the decision below nor that of the District Court is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit Court of Appeals. The question involved is not one of general importance, nor does it affect the public interest. The basic question is purely one of fact on

which the concurrent findings of the District Court and of the Circuit Court of Appeals should be accepted by this Court.

The Case Below.

The case involves the single question of whether the stranding in the Bay of Fundy of the M. V. "Aakre" in the early morning of October 29, 1937, with consequent damage to petitioners' cargo laden thereon, was due to an error of navigation of the ship's officers, for which the vessel and carrier are relieved from responsibility by the terms of the Canadian Water Carriage of Goods Act, 1936, incorporated in the bills of lading, or was due to unseaworthiness of the vessel caused by want of due diligence on the part of the carrier for which the vessel and carrier are not relieved from responsibility by said Act.

The District Court after hearing practically all the witnesses orally, in a careful and well considered opinion, based on clear and definite findings of fact, held that the stranding was solely due to errors of navigation of the second officer in erroneously transcribing to the navigating chart two radio bearings received by him from St. John, by reason of which error the master was deceived so that he changed his course to the westerly and brought his ship up on the shoal.

The Circuit Court of Appeals affirmed the decree below, likewise finding that the stranding was due to the second officer's errors in navigation. Judge Frank, in a dissenting opinion, thought that the District Judge had not made an adequate finding of fact negativing the possibility that the violation of a Norwegian Statute, which required the ship's officers to record

deviations of the compass in the ship's compass book, could have contributed to the stranding and suggested that the case should be remanded for further findings on this point.

The opinion of the District Court is reported in 31 F. Supp. 8; it is printed in the record at pages 1370-1405. The opinion of the Circuit Court of Appeals is reported in 122 F. (2d) 469; it is printed in the record at pages 1443-1462.

Argument.

I.

The decisions below are in conflict neither with the rule enunciated by this Court in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, nor with the decision of another Circuit Court of Appeals.

From petitioners' brief one might infer that the decisions of both courts below emasculated the rule of *The Pennsylvania*, 19 Wall. (86 U. S.) 125, and were contrary to the decision of the Ninth Circuit Court of Appeals in *The Denali*, 105 F. (2d) 413. Nothing could be further from the truth. The rule of *The Pennsylvania*, *supra*, springs from the following sentences in the opinion of this Court at page 136:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

The rule thus laid down is clearly a rule of evidence to be applied by the Court to the facts as found by it.

The District Court recognized this rule and, having applied it to the facts, held that "the shipowner has sustained the heavy burden of proof laid on it by that rule, and has shown that, if there was any breach of said Norwegian Statutes or Rules, such breach not only did not but could not, under the facts here shown, have caused or contributed to the 'Aakre's' stranding" (R. 1401-2). It also found and held on the facts "that the stranding of the 'Aakre' was exclusively due to errors of navigation in the respects above described, and that her stranding not only was not caused or contributed to by any unknown deviation in her compass or any failure, of which her navigators may have been guilty, to record all her compass deviations in her compass book but under the facts here shown could not have been caused thereby" (R. 1401).

In view of this clear and express application by the District Court of the rule of *The Pennsylvania* to the facts as found, the express finding that the stranding was "exclusively due" to errors of navigation and the further finding that the failure of the ship's officers to record all compass deviations in the ship's compass book not only did not cause or contribute to the stranding but could not have done so, it is difficult to find any substantial ground for Judge Frank's view that the findings on this point were inadequate (R. 1461).

The Circuit Court of Appeals in its discussion of the rule of *The Pennsylvania* (R. 1450-1) as applied to the facts at bar pertinently observed that, if it is more than a rule of evidence or procedure shifting "the burden of proof with regard to the causal relation

of default to injury" * * * "it affects the substantive rights of the parties" * * * and "is not applicable to a cause triable under foreign law". It then held that, if the rule "does no more than shift the burden of proof, the vessel has met that burden in this case by credible evidence on every point at issue" * * * "Still if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony" (R. 1450-1).

Not even legal casuistry can obscure the meaning of these plain words from the decisions below. They show a clear application of the rule of *The Pennsylvania* to the facts as found. The petitioners' solemn statement that this case presents the question of "whether the rule laid down by this Court in *The Pennsylvania* is still law in the Second Circuit" (Petition, p. 5) is without foundation. If that rule contemplated anything more than a rebuttable presumption—which is all that its wording indicates—then, even had it been created by statute, it would have been unconstitutional as a violation of the due process clause of either the Fifth or the Fourteenth Amendment. *Heiner* v. *Donnan*, 285 U. S. 312, 328; *Schlesinger, et al.* v. *State of Wisconsin*, 270 U. S. 230, 240; *Western & Atlantic R. R.* v. *Henderson, et al.*, 279 U. S. 639, 644. It must, therefore, be presumed that this rule of *The Pennsylvania* established by the Court itself constituted nothing more than a rebuttable presumption and provided merely, as the Circuit Court

of Appeals below stated, "a shift in the burden of proof with regard to the causal relation of default to injury" (R. 1450).

The fact that in cargo damage cases the rule in *The Pennsylvania* adds nothing to the ordinary rules of evidence as alleged in petition, page 9, is of no consequence since cargo always makes out a *prima facie* case upon showing delivery to the ship in good condition and receipt in bad condition, thereby throwing the burden of going forward with the evidence upon the ship. *The Pennsylvania* was a case of collision between two vessels where either vessel, to recover, had to prove negligence of the other as well as its own damages, so that the presumption created an important change in the rules of evidence.

The application of the rule of *The Pennsylvania* to the facts as found below is not in conflict with any decision of this Court. Nor is it in conflict with any applicable decision of another Circuit Court of Appeals. Petitioners' brief appears to rely mainly upon *The Denali*, 105 F. (2d) 413, 418 in the Ninth Circuit where the Court quotes from its previous decision in *The Princess Sophia*, 61 F. (2d) 339, 347, in which the word "penalty" is used in describing the burden placed upon a shipowner under the rule of *The Pennsylvania*. The use of an inapt descriptive word by a lower court in discussing a rule laid down by this Court does not modify the rule and this Court's approval thereof is not given by a denial of certiorari. *United States, et al. v. Carver, et al.*, 260 U. S. 482, 490. In fact having used the word "penalty" the Circuit Court of Appeals for the Ninth Circuit proceeds to define it as meaning merely a shifting of the burden of proof which is precisely the way in

which the Circuit Court of Appeals herein defined the obligation under the rule.

In situations involving the application of the rule of *The Pennsylvania* it is almost impossible to say that any one case is in conflict with another since each decision depends upon the facts as found therein and such facts are rarely twice alike. As long as both courts below understood the rule correctly (as it clearly appears they did) and applied the rule to the facts as found, their decisions should not be disturbed.

The questions involved below were entirely questions of fact which were resolved in favor of the respondents. (See opinion of Circuit Court of Appeals: R. 1451.) Both courts having found as a fact that the violation of the Norwegian statute did not and could not have caused or contributed to the stranding of the vessel, such findings should be accepted as conclusive by this Court under well settled doctrine. *Wuppermann* v. *The Carib Prince,* 170 U. S. 655, 658; *Workman* v. *Mayor etc. of New York,* 179 U. S. 552, 555; *International Navigation Co.* v. *Farr & Bailey,* 181 U. S. 218, 224; *W. J. McCahan Sugar Refining Co.* v. *The Wildcroft,* 201 U. S. 378, 387.

II.

It is doubtful whether a breach of the Norwegian statutory provisions with reference to the keeping of compass records would come within the rule of *The Pennsylvania,* 19 Wall. (86 U. S.), 125.

The Norwegian statutory provisions were as follows:

(a) Royal Decree of October 21, 1926, which provided that a special compass and chronometer book

made in connection with an annexed formula should be kept on all ships of over 500 tons gross register (R. 1124). The annexed formula referred to in the decree contained provisions as to the entering of information regarding compass-compensations and complete deviation-investigations and provided that "the enterings shall be done by him who has made the compensation or the investigation" and that, if this person was not an expert from ashore, the captain was to see that the enterings were made and, if he found it convenient should group by themselves the data for one or more courses that lay near to each other (R. 1125).

(b) Royal Decree of December 2, 1932, which provided that the captain should see that the compasses were kept in good order and "their deviation examined"; that when the ship was at sea deviation-examination must be made every day when it can be done and that on ships above 500 tons gross register in foreign trade "shall the result of compensation and examination of deviation be entered into a special compass-and chronometer book" (R. 1126).

(c) Section 421 of the Norwegian Criminal Code of May 22, 1922, which provided: "If the Master, Mate or Engineer on a Norwegian ship fails to do what is prescribed with regard to enterings in log book or other books or the keeping up and handing in of such, he shall be punished with fines or with prison until 2 months" (R. 1126).

These decrees and statute are merely disciplinary regulations directed to the officers and engineers of the ship and not to the vessel or owner. The vessel's continuance in navigation is not made contingent upon her officers' compliance with these requirements.

The case, therefore, differs from *The Denali,* 105 F. (2d) 413, where the statutes involved (fixing the length and number of watches at sea and the number of officers) were directed to the owner and vessel as well as the master, and provided that in case of violation the owner was subject to fine and his ship subject to prohibition from navigation.

Likewise the Section of the Criminal Code is penal in nature and as such should be "construed to apply only to the class of persons to whom it specifically refers" *Warshauer* v. *Lloyd Sabaudo,* 71 F. (2d) 146, 148, C. C. A. 2; *Field* v. *United States,* 137 F. 6, 8, C. C. A. 8; *Martin* v. *United States,* 168 F. 198, C. C. A. 8. It would appear, therefore, that any inference or presumption to be drawn from violation of these Norwegian decrees and statutory provisions should be purely against the officers and crew who were required to enter the data in the log books and who were subject to penalty and imprisonment if they did not do so, rather than against the owner of the vessel who is nowhere mentioned in said decrees or statute. In this connection consideration should be given to the well established rule that a penal statute of another country will not be enforced in the United States *Huntington* v. *Attrell,* 146 U. S. 657; *The Vestris,* 53 F. (2d) 847, D. C. S. D. N. Y.

We know of no case where the rule of *The Pennsylvania* has been held by an American court to apply to the violation of foreign statutory provisions like those involved below where, as here, there is no proof that such violation would have given rise to any such presumption in the courts of the country that enacted such statutes.

Under English and Canadian law at the time of

the stranding legal presumptions arising out of collisions had been abolished by the adoption of the Brussels Maritime Convention of 1910. As the cargo was laden and bills of lading issued in a Canadian port, its rights were determined by the Canadian law, the Canadian Water Carriage of Goods Act 1936 having been expressly incorporated into the bills of lading.

The only decision of this Court applying the rule of *The Pennsylvania* to a non-collision case is *Richelieu Navigation Co.* v. *Boston Insurance Company*, 136 U. S. 408, 422-3, which was an action on a marine insurance policy for loss caused by stranding of a vessel in Canadian waters where the rule was applied because of the provision of a Canadian statute then in effect creating a presumption of fault from the non-observance by any vessel of any of the rules prescribed thereby.

All except one of the cases (*Dorrington* v. *City of Detroit*, 223 F. 232), cited by petitioners at pages 11 and 12 of their brief arose out of collision. There would seem to be a distinction between violation of rules of navigation (designed to prevent collisions), in a collision case where the collision itself necessarily creates a presumption that it was caused by the violation of the rule, and violation of a statute regarding entry of deviations in a particular compass book (designed to perfect navigators' records and make them more accessible) in a stranding case, since the stranding itself would not necessarily create a presumption that it was caused by a violation of the statute concerning such entry of deviation records.

III.

The question involved is not one of general importance and does not affect the public interest.

This is a mere cargo damage case in which, under the controlling Canadian Carriage of Goods by Sea Act 1936, the sole question at issue is whether the stranding which caused the damage was due to errors in navigation of the ship's officers for which the carriers are freed of responsibility by virtue of said Act. It is purely a question of fact. A case involving similar facts would rarely happen again. In fact both at the trial and on the appeal petitioners futilely argued that the simple mistakes of navigation made by the second officer could not have been made (R. 1446). No loss of life is involved. It is not a case of general importance. In no way does it affect the public interest.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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H. C. ARCHIBALD,
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November 21, 1941.